Docket No. 03-240

IN THE SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner,

v.

William Larson,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Local Ordinance 1923, provides:

> 1. Any individual obtaining a room in a hotel, motel, or other public lodging facility shall be subject to search by an authorized law enforcement officer if that officer has reasonable suspicion to believe that the individual is:
>
> a. A minor engaging in a commercial sex act as defined by federal law
> b. An adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.
>
> 2. This ordinance shall be valid only from Monday July 11, 2015, through Sunday July 17, 2015.
> 3. A search conducted under the authority of this provision shall be limited in scope and duration to that which is reasonably necessary to ascertain whether the individual searched is engaging in the conduct described in subsection (1).
> 4. This ordinance shall be valid only in the Starwood Park neighborhood.
>
> a. Starwood Park is defined to encompass the area within a three-mile radius of Cadbury Park Stadium.

STATEMENT OF THE ISSUES PRESENTED

I. Does a search pursuant to Local Ordinance 1923, that is only minimally intrusive upon the individual privacy interest, satisfy the special needs exception to the Fourth Amendment when its primary purpose of protecting children from the perils of sex trafficking during the All-Star Game serves a compelling governmental interest that makes the warrant and probable cause requirement impracticable under the circumstances?

II. Was it reasonable for Officer Nelson to believe that W.M. held apparent authority to consent to the search of Respondent's apartment and the cell phone found therein, given his awareness that both Respondent and W.M. cohabitated and shared mutual access to the cell phone that she too used for personal communication?

STATEMENT OF FACTS

Starwood Park neighborhood in downtown Victoria City, Victoria has been and continues to be plagued with illegal gang activity. R. at 2. The "Starwood Homeboyz" and the "707 Hermanos" engage in the lucrative and highly exploitative child sex trafficking market. R. at 2. Each year, children are traded as a commodity in the sex trafficking business, leaving more than 8,000 victims annually in Victoria City, and nearly 1,500 in Starwood Park alone. R. at 40. These groups use lucrative websites that are hard to monitor, making it difficult for law enforcement to locate the perpetrators. R. at 2.

Victoria City was designated by the Professional Baseball Association to host the All-Star Game on July 14, 2015. R. at 2, 41. The Victoria City Board of Supervisors ("Board") was informed of an interesting dynamic: sporting events, like the All-Star Game, are a critical element for an increase in demand for sex services, as noted by the studies and scholarship conducted by Arizona State University and the National Center for Missing and Exploited Children. R. at 41. Concerned that a "similar rush of human trafficking" would take place during the All-Star Game, the Board enacted Local Ordinance 1923 ("L.O. 1923"). R. at 2, 41. The Board wanted to use L.O. 1923 as an "innovative step" in protecting local and visiting children, while providing them with a fun and safe week. R. at 41.

Officer Joseph Richols and Officer Zachary Nelson were on patrol on the evening of July 12, 2015, when they noticed William Larson ("Respondent") and a much younger woman (W.M.) enter the Stripes Motel at approximately 11:22 p.m. R. at 3. The officers grew suspicious based on several observations which led them to think they had reasonable suspicion to believe Respondent was engaging in child sex trafficking. R. at 27-28. Consequently, they conducted a search of Respondent and W.M. pursuant to L.O. 1923. R. at 27-28. Officer Nelson searched

Respondent first and recovered the following from the pockets of a large jacket he was wearing: nine condoms, lube, a butterfly knife, $600 in cash, two pills of oxycodone, a list of names and corresponding price and time, and a pair of house keys. R. at 28. Officer Richols arrested Respondent for sex trafficking of a minor. R. at 4. Officer Nelson proceeded to search W.M. and found a valid driver's license indicating she was sixteen years old. R. at 29.

Believing W.M. was a victim of sex trafficking, the officers did not arrest her and asked if they could speak with her. R. at 29. Officer Nelson asked W.M. if she had a safe place to stay the night. R. at 29. W.M. told Officer Nelson that she lived with Respondent at an apartment located on 621 Sasha Lane, and could stay there even though he was arrested. R. at 36. She told the officer that although the lease was under Respondent's name, "they shared everything." R. at 29. Officer Nelson proceeded to ask W.M. more questions concerning her stay at 621 Sasha Lane. R. at 30. He was not entirely sure if W.M. and Respondent shared mutual use of the premises. R. at 30. During their conversation, W.M. stated that she had medical bills and other personal mail sent to the residence. R. at 30-31. W.M. further stated that she and Respondent always slept together, she cooked in the apartment, and did chores there as well. R. at 33. Officer Nelson and W.M spent approximately ten minutes talking before he asked her for permission to search the apartment. R. at 31, 37. W.M. agreed and led him to the apartment, where she used a spare key underneath a fake rock to open the door. R. at 31.

During his search of the apartment, Officer Nelson found a loaded black semi-automatic handgun underneath the bed. R. at 31. Officer Nelson also found a cell phone on a nightstand next to the bed that W.M. and Respondent shared. R. at 31, 33. The phone had a custom cover with an "S" and a "W" wrapped around a wizard's hat identical to Respondent's tattoo. R. at 3. Officer Nelson asked W.M. if the phone belonged to her, and she responded that this was the

phone they shared. R. at 31. W.M. informed him that she used the cell phone to operate her social media accounts (Facebook and Snapchat), send personal texts, and make personal calls. R. at 32. Officer Nelson asked W.M. if she knew the password, which she did. R. at 4. He then asked if he could search the cell phone; W.M. said yes. R. at 32. A search of the phone revealed inappropriate pictures of W.M. and a video of Respondent rapping about "pimping." R. at 32.

SUMMARY OF THE ARGUMENT

The Circuit Court failed to properly mark the permissible limits of Fourth Amendment exceptions when law enforcement in conjunction with a community seek to eliminate with the harm and danger posed to children from the sex trafficking trade during a major sporting event. In failing to strike a balance between individual privacy interests and pressing public and governmental concerns, the Circuit Court failed to clearly interpret and properly apply this Court's jurisprudence on the doctrines of "Special Needs" and "Apparent Authority to Consent." Furthermore, the Circuit Court erred by reversing the District Court's findings in denying Respondent's motion to suppress for several reasons.

First, L.O. 1923 satisfies the special needs exception to the Fourth Amendment because its primary purpose of protecting children from the perils of child sex trafficking goes beyond the general need of criminal law enforcement. L.O. 1923 was promulgated to address the specific concern of increased child sex trafficking during the All-Star Game. This concern is distinct from the ordinary interest in arresting child sex traffickers, which occurs daily in Victoria City. Furthermore, the fact that law enforcement officials were not involved in the planning of L.O. 1923 evidences that the primary purpose is divorced from the ordinary evidence-gathering objective associated with criminal law enforcement.

The ordinary warrant and probable cause requirements of the Fourth Amendment are unnecessary in this context to render a search pursuant to L.O. 1923 reasonable. The nature of the privacy interest at stake is being free from unreasonable searches, which is outweighed by the minimally intrusive search of L.O. 1923, and compelling governmental interest. In this context, reasonable suspicion strikes a permissible balance between safeguarding individual privacy interests and promoting the government's compelling interest in protecting vulnerable children from the perils of sex trafficking during the All-Star Game. This compelling interest is immediate and substantial, due to the increased demand for child sex trafficking during the All-Star Game. Lastly, L.O. 1923 is a reasonably effective method of protecting children from child sex trafficking because it allows officers to ascertain whether a child needs to be removed from potentially dangerous situations.

Second, Officer Nelson's search of the apartment was proper. Officer Nelson's belief was in conformity with the doctrine of apparent authority to consent as refined in *Illinois v. Rodriguez*. He was aware that W.M. and Respondent cohabited together and shared mutual access to the apartment. The doctrine of apparent authority to consent should be extended to a cell phone, as several circuit courts have done so for computers. As noted in *Riley v. California*, a cell phone should be treated as a "minicomputer." Officer Nelson reasonably concluded that W.M. held the apparent authority to consent to the search of the cell phone. Respondent and W.M. mutually shared the cell phone, and W.M. used it for personal communication and to operate her social media. Furthermore, Officer Nelson's search of the apartment did not exceed the scope of the search granted by W.M. because she did not express any confusion nor was his request to search vague. In searching the cell phone, Officer Nelson did not exceed the scope of

the consent granted because W.M. did not express any objection prior or during the search of the cell phone.

While the specter of doing away with certain constitutional protections of individual privacy urges this Court to exercise caution, an increasing threat of child sex trafficking stands in the way of some of the key responsibilities that our founding fathers left us with in our Constitution: "to form a more perfect Union, establish Justice, insure domestic Tranquility,...[and] promote the general Welfare…"

STANDARD OF REVIEW

This Court reviews findings of fact on a motion to suppress under the clearly erroneous standard, and the district court's conclusions of law are reviewed de novo. *United States v. Washington*, 340 F.3d 222, 226 (5th Cir. 2003). Furthermore, all facts are viewed in light most favorable to the prevailing party. *Id.*

ARGUMENT

I. L.O. 1923 FALLS WITHIN THE "SPECIAL NEEDS" EXCEPTION TO THE WARRANT AND PROBABLE CAUSE REQUIREMENTS OF THE FOURTH AMENDMENT BECAUSE IT SERVES A SPECIAL GOVERNMENTAL NEED, BEYOND THE NORMAL NEED FOR LAW ENFORCEMENT, THAT MAKES THE WARRANT AND PROBABLE CAUSE REQUIREMENT IMPRACTICABLE.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV (Westlaw 2016). Subject to a few well-delineated exceptions, a search is unreasonable unless it is performed pursuant to a warrant issued upon probable cause. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). This court has recognized an exception where a search serves a special governmental need, beyond the normal need for law enforcement. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). In such a case, it is necessary to balance the individual's privacy intrusion against the governmental interests to determine

whether "it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id*. at 665-66. Thus, to satisfy special needs, the government must show: first, that the primary purpose of the search serves a special governmental need, beyond the normal need for law enforcement; and second, that imposing a warrant or a certain level of individualized suspicion in the present context is not essential to render the intrusion at issue reasonable. *Id.* at 665.

L.O. 1923 satisfies the special needs exception to the Fourth Amendment because it serves a special governmental need, beyond the ordinary need for law enforcement, namely to protect local and visiting children against the perils of child sex trafficking during the week of the All-Star Game. R. at 41. Furthermore, the warrant and probable cause requirements are impractical and unnecessary to render L.O. 1923 reasonable in this context, given the minimal privacy intrusion and the compelling governmental interest. Thus, because L.O. 1923 does not violate the Fourth Amendment, this Court should reverse the Circuit Court's grant of Respondent's motion to suppress.

A. A search pursuant to L.O. 1923 serves the primary purpose of protecting children from the perils of child sex trafficking, which is separate and divorced from the government's generalized interest in criminal law enforcement.

For a search to satisfy special needs, the immediate purpose of the search must be unrelated to the day-to-day evidence gathering associated with crime control and investigation. *Ferguson v. City of Charleston*, 532 U.S. 67, 100 (2001). In determining the primary purpose, this Court will not simply accept the "invocation of a special needs," but will instead, carry out a "close review" of the search scheme. *Id.* at 81.

L.O. 1923 does not serve a "general interest in crime control" because it is not broadly aimed at society's child sex trafficking problem. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 441-42 (2000) (rejecting the state's generalized interest in addressing society's drug problem

because such generality "would do little check on the ability of authorities to construct roadblocks for almost any conceivably law enforcement purpose"). L.O. 1923 is aimed at responding to a "special law enforcement concern" of protecting children from the perils of child sex trafficking during the week of the All-Star Game. R. at 2; *See Illinois v. Lidster*, 540 U.S. 419, 423-24 (2004); *Skinner*, 489 U.S. 602, 619 (underlying problem of alcohol and drug abuse by railroad employees, which posed a serious threat to safety, led to a policy requiring blood and urine tests of employees who were involved in accidents); *MacWade v. Kelly*, 460 F.3d 260, 270 (2d Cir. 2006) (search policy of subway riders implemented in response to a string of bombings on commuter trains and subway systems abroad).

In the present case, L.O. 1923 was promulgated in response to fears that the All-Star Game would create a swell of human trafficking activity in the Starwood Park neighborhood. R. at 2. A study conducted by Arizona University found that the demand for child sex services increases in the days leading up to major sporting events. R. at 41. Another study by the National Center for Missing and Exploited Children estimated that nearly 10,000 individuals were trafficked into Miami during the 2010 Super Bowl. R. at 41. Furthermore, there was already an underlying problem of child sex trafficking with more than 8,000 victims annually in Victoria City, and nearly 1,500 in Starwood Park. R. at 40. It was a realistic probability that the All-Star Game would bring a surge of child sex trafficking to the Starwood Park neighborhood. Thus, L.O. 1923 addresses a real and specific problem that is distinct from the ordinary and daily goal of apprehending criminals of child sex trafficking.

Furthermore, extensive law enforcement involvement in the planning of a search scheme and promulgation of procedures that include the threat of prosecution, delineates the primary purpose as a tool to gather evidence for criminal law enforcement. *See Ferguson*, 532 U.S. at 67,

82-84 (finding that a hospital's policy of drug testing pregnant women was indistinguishable from the general interest in crime control due to the pervasive involvement of law enforcement from its inception, and procedures setting forth the threat of arrest and prosecution). This case is unlike *Ferguson* where L.O. 1923 was planned and drafted solely by the Board with the primary purpose of protecting children from sex trafficking during the All-Star Game. R. at 2, 41. L.O. 1923 does not set forth the threat of criminal law enforcement, nor is it described as a tool to aid law enforcement in the conviction of unlawful child sex traffickers. R. at 2, 41. The only connection to law enforcement is that officers are responsible for conducting the searches. R. at 2. However, this is not a foregone conclusion that law enforcement is the primary purpose. *See Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987); *MacWade*, 460 F.3d at 264 (upholding special needs where New York Police Department was responsible for inspecting subway riders entering the station). Thus, unlike *Ferguson*, the threat of law enforcement was never essential to the success of L.O. 1923 in protecting children from child sex trafficking during the All-Star Game. Therefore, L.O. 1923 serves a primary purpose beyond the general need for law enforcement as evidenced from its inception.

Moreover, some law enforcement objectives may still qualify as special needs so long as the immediate objective is not to gather evidence of a specific crime or criminal wrongdoing. *See Lidster*, 540 U.S. at 423-24. In *Lidster,* this Court upheld the constitutionality of a checkpoint designed to obtain information about a fatal hit-and-run accident that occurred a week prior. *Id.* at 422. Defendant challenged his arrest and conviction on the ground that the evidence was obtained through a checkpoint that like *Edmond*, violated the Fourth Amendment. *Id.* at 423. However, this Court distinguished *Edmond*, where drug checkpoints had been set up for the primary purpose of detecting evidence of criminal wrongdoing; whereas in *Lidster*, the primary

purpose was to seek information of the hit-and-run that in all likelihood was committed by others, with the ultimate purpose of apprehending the hit-and-run suspect. *Id.* The information-seeking checkpoint went beyond the ordinary law enforcement need because, at the time of the questioning, the purpose was not to detect evidence of a specific crime. *Id.* Thus, the fact that the information may help law enforcement identify the perpetrator of a crime, was an additional, beneficial, or secondary purpose of the search. *Id.*

In the present case, L.O. 1923 addresses a special law enforcement concern that is not aimed at collecting evidence of a specific crime. R. at 2. L.O. 1923 authorizes law enforcement, with reasonable suspicion, to search an individual in order to ascertain whether that person is engaging in, facilitating, or attempting to facilitate commercial sex acts. R. at 2. The primary purpose of the search is the protection of children from such dangerous situations during the All-Star Game. R. at 41. Similar to *Lidster*, officers are not seeking information of a specific crime, and the fact that there is a likelihood of an arrest and prosecution for, *inter alia*, child sex trafficking, does not define the primary purpose of the search as general law enforcement. Therefore, what is important is that L.O. 1923 serves a primary purpose beyond the normal need for law enforcement, regardless of the likelihood of arrest.

B. The warrant and probable cause requirements are not essential to render a search pursuant to L.O. 1923 reasonable under the Fourth Amendment because the government's compelling interest in protecting children from sex trafficking and minimally intrusive search outweigh any individual privacy concerns.

The Fourth Amendment is a constraint, not against all intrusions, but "against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Maryland v. King*, 1333 S.Ct. 1958, 1969 (2013). As long as the specific circumstances render a search reasonable, the typical warrant and probable cause requirements are not necessary. *Id.* In the special needs context, reasonableness requires balancing the following three factors to

determine whether a warrant or, in the alternative, a certain level of individualized suspicion is required: (1) the nature of the privacy interest involved; (2) the character of the governmental intrusion; and (3) the nature and immediacy of the government interest, and the efficacy of the search in advancing that interest. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-65 (1995).

The nature of the privacy interest in the present context is important because an individual subject to search has a legitimate expectation of privacy that is not relinquished simply for being in public areas. *Ybarra v. Illinois*, 100 S.Ct. 338, 342 (1979) (finding that tavern patrons were "clothed with constitutional protection against an unreasonable search"). However, this must not be "treated in isolation or accorded dispositive weight, but rather must be balanced against other fact-specific considerations." *MacWade*, 460 F.3d at 269. Therefore, the only factors at issue are the character of the governmental intrusion, the nature and immediacy of the government interest, and the efficacy of the search in advancing that interest.

1. A search pursuant to L.O. 1923 makes the warrant and probable cause requirement unnecessary because it is only minimally intrusive upon the individual privacy interest and is narrowly tailored to achieve its compelling governmental purpose.

The purpose of the warrant and probable cause requirements of the Fourth Amendment is to assure individuals that the intrusion is authorized by law, and that it is narrowly tailored to achieve its objectives. *Skinner*, 489 U.S. at 622. In the present context, a warrant and probable cause requirement would do little to further these aims because L.O. 1923 is narrowly tailored to further its purpose, and the privacy interest implicated is minimal. *Id*.

A search with a limited and short duration intrudes only minimally on the privacy interest the Fourth Amendment seeks to protect. *See Lynch v. City of New York*, 737 F.3d 150, 165 (2d Cir. 2013); *see also Lidster*, 540 U.S. at 427 (finding a checkpoint minimally intrusive that required only a brief wait in line and a few seconds of contact with police); *Cassidy v. Chertoff*,

471 F.3d 67, 79 (2d Cir. 2006) (determining the "cursory" duration of the stops or searches to be minimally intrusive where there was only a brief inspection of vehicles and their trunks and a brief examination of the contents of carry-on bags). In the present case, a search pursuant to L.O. 1923 is limited in duration to that which is necessary to determine whether the individual being searched is engaging in child sex trafficking. R. at 2. In Respondent's case, Officer Nelson reached into the pocket of his large jacket and uncovered several items. R. at 4. Although the record is unclear as to the exact timing of the search, Officer Nelson complied with the limited duration of L.O. 1923 by not continuing to search Respondent. R. at 28. Therefore, the limited duration of a search minimizes the privacy intrusion in this context.

Moreover, advanced notice makes a search minimally intrusive because it helps reduce any "unsettling show of authority that may be associated with unexpected intrusion on privacy." *See Von Raab*, 489 U.S. at 672 n.2 (finding the employee's knowledge of drug test at the outset and advanced notice of scheduled sample collection significantly minimized the intrusion on privacy interest). The board's announcement of L.O. 1923 provided notice to individuals who may be subject to a search, thereby affording them an opportunity to avoid the search. *See Cassidy*, 471 F.3d 67 (finding that plastic signs near ticket booths and boarding areas provided ample notice to passengers seeking to board ferries that they were subject to search but could avoid a search by leaving the premises). Here, the Board released a press statement on May 6, 2015, announcing the implementation of L.O. 1923, effective July 11, 2015. R. at 41. This statement provided advanced notice to anyone who may be subject to search, thereby providing them an opportunity to avoid a search by staying away from all hotel, motel, or other public lodging facilities. R. at 2. Such notice also makes the warrant requirement unnecessary as it

provides a safeguard against the unsettling and unexpected show of authority while making a search pursuant to L.O. 1923 minimally intrusive.

Also, the methods employed by L.O. 1923 make a search minimally intrusive because they are limited in scope, time, and location – consistent with its purpose. *See MacWade*, 460 F.3d at 273; *See also Cassidy*, 471 F.3d at 79 (methods used to conduct searches of ferry riders weighed in government's favor, where the scope was limited to visual inspections of vehicles and their trunks and brief examinations of the contents of carry-on baggage). Here, L.O. 1923 is limited in scope to that which is necessary to determine whether the individual subject to search is engaging in conduct the ordinance intends to protect. R. at 2. L.O. 1923 does not allow unbridled permission for officers to search the individual's motel room, vehicles, or luggage. R. at 2. Furthermore, the timing of L.O. 1923, from July 11, 2015, through July 17, 2015, is consistent with its purpose of protecting children from the increased demand in child sex trafficking during the All-Star Game, which was to be held on July 14, 2014. R. at 2, 41. Also, L.O. 1923 is limited to the Starwood Park neighborhood, which is within a three-mile radius of Cadbury Park Stadium. R. at 2-3. These restrictions limit the reach of L.O. 1923, and are consistent with its compelling governmental interest, thus making a search minimally intrusive.

Furthermore, what makes the government's need in protecting children from the perils of sex trafficking during the All-Star Game "special," despite the relationship with law enforcement, is "its incompatibility with the normal requirements of a warrant and probable cause." *See United States v. Amerson*, 483 F.3d 73, 82 (2d Cir. 2007). In *Amerson*, the court found the 2004 DNA Act to be incompatible with the normal warrant and probable cause requirements because the primary purpose of the Act was to obtain identifying information by collecting DNA samples from certain probationers, not to uncover evidence of wrongdoing or

solve a particular crime. *Id.* Thus, the imposition was one in which individualized suspicion had little role to play. *Id.* The court also found important the programmatic nature of the DNA Act, under which all probationers were required to submit DNA samples, leaving no discretion for law enforcement to decide which individuals to take a DNA sample from. *Id.* It was this lack of discretion that removed a significant reason for warrants: to provide a check on the arbitrary use of governmental power. *Id.*

Similar to *Amerson*, probable cause in determining which individuals to search is incompatible in this context. *Id.* Probable cause exists where there is "a fair probability that contraband or evidence of a crime will be found." *United States v. Sokolow*, 490 U.S. 7 (1989). Thus, because probable cause is "peculiarly related to criminal investigations," it is incompatible with L.O. 1923, where the primary purpose is to protect children from dangerous situations of sex trafficking, and not to uncover evidence that a particular crime is occurring. R. at 41; *See Bd. of Educ. v. Earls*, 536 U.S. 822, 828-29 (2002) (finding that because a policy of drug testing students participating in extracurricular activities was in no way related to conduct of criminal investigations, the probable cause requirement was unsuited in determining reasonableness); *O'Connor v. Ortega*, 480 U.S. 709, 723 (1987) (plurality opinion) (finding it "difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search was to retrieve a file for work-related reasons").

Moreover, reasonable suspicion in this context provides the same protection against the perils the Fourth Amendment seeks to protect. Reasonable suspicion requires more than an "inchoate and unparticularized hunch." *See Sokolow*, 490 U.S. at 7. An officer is not given unrestricted discretion to search an individual in any hotel, motel, or other public lodging facility, but must first point to reasonable facts that lead him to believe that the individual is

engaging in commercial sex acts. R. at 2. Thus, reasonable suspicion provides a check on officers against the arbitrary use of government power. *Amerson*, 483 F.3d at 82. Therefore, while probable cause is incompatible with L.O. 1923, reasonable suspicion provides a sufficient safeguard against unreasonable searches the Fourth Amendment aims to protect.

2. The government interest is immediate and substantial given the grave dangers of child sex trafficking, and L.O. 1923 is reasonably effective in advancing that interest.

The governmental interest of protecting children from sex trafficking does not require an express threat or special imminence before this court accords "great weight to the government's interest in staving off considerable harm." *See MacWade*, 460 F.3d 260, 272 (holding that the threat of subway bombings was sufficiently immediate in light of the thwarted attempts and recent bombings in places like Madrid, Moscow, and London); *See also Skinner*, 489 U.S. at 607 (upholding railroad employee drug testing based on findings of drug use by railroad employees nationwide). What is required is that the threat of child sex trafficking be substantial and real, and not simply symbolic. *Chandler v. Miller*, 520 U.S. 305, 319, 321-22 (1977) (finding drug test requirements of candidates for state office was impermissible because there was no evidence of a particular problem the policy was responding to, and the only reason was the image the state sought to protect). Here, studies show an increase in demand of sex services during major sports events. R. at 41. The fact that there was already a serious sex trafficking problem in the Starwood Park neighborhood, coupled with the increased demand during the All-Star Game, indicated there was a real and substantial threat of child sex trafficking. R. at 2. This threat was not merely symbolic because the Board cited statistics in support of L.O. 1923. R. at 41. Therefore, the government's interest in protecting local and visiting children from the perils of child sex trafficking was immediate and substantial.

Furthermore, dispensing with the warrant requirement is "at its strongest when, as here, the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *O'Connor,* 480 U.S. at 720; *Skinner*, 489 U.S. at 623 (finding the immediacy of conducting breath and blood samples as soon as possible after an accident due to the constant rate in which alcohol and other drugs are eliminated from the blood stream). Child sex trafficking is highly lucrative and difficult to detect, while the impact on a child is devastating and can have everlasting trauma. R. at 2, 41. These circumstances call for swift and prompt action, to remove the child from such dangerous situations before harm can be done. R. at 41. Requiring an officer to obtain a warrant would be unduly burdensome and seriously disruptive to the primary purpose of L.O. 1923. Thus, the warrant requirement is unworkable in the present context.

Moreover, L.O. 1923 is a reasonably effective method of protecting children from sex trafficking because it is limited to locations where child sex trafficking is likely to occur, and allows an officer to ascertain whether a child needs to be removed. R. at 41. The task of this court is not to determine whether L.O. 1923 is "optimally effective," but whether it is reasonably so. *See Cassidy*, 471 F.3d 67, 85 (finding the policy of randomly searching persons on ferries was reasonably calculated to serve its goal of deterring potential terrorist threats, even if its measures were not optimally effective since the search policy did not apply to containers inside a car, tractors or trailers). The Board made it clear that the purpose of L.O. 1923 was to protect local and visiting children from sex trafficking by providing law enforcement the tools they need to act when they spot signs of child sex trafficking. R. at 41. Such a search is reasonably calculated to serve the goal of identifying the occurrence of child sex trafficking, something that law enforcement is unable to detect by visual observation. Furthermore, L.O. 1923 is limited to

individuals obtaining a room in a hotel, motel, or other public lodging facility, where it is reasonable to believe child sex trafficking is likely to occur. R. at 2. Therefore, L.O. 1923 is a reasonable method of protecting the children from the perils of sex trafficking.

II. W.M. POSSESSED AUTHORITY TO CONSENT TO A SEARCH OF THE APARTMENT AND THE CELL PHONE BECAUSE W.M.'S STATEMENTS AND HER RELATION TO THE APARTMENT AND CELL PHONE LED OFFICER NELSON TO REASONABLY BELIEVE W.M. HAD JOINT ACCESS AND CONTROL.

Consent to search is a question of fact to be determined "from the totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). When a third person grants consent to search the residence of another, this Court has required that the "search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171-72 (1974). Apparent authority to consent, however, operates from the standpoint of a reasonable officer. *Illinois v. Rodriguez*, 497 U.S. 177, 185-89 (1990). Therefore, the Fourth amendment is not violated when officers enter a premise without a warrant when they reasonably believe – albeit, erroneously – that the person who gave consent has the authority to consent to such entry. *Id*. The officers' belief need not be accurate, correct, or perfect; "all the Fourth Amendment requires is that they answer it reasonably." *Id.* at 186. Thus, the pressing issue for this Court to weigh when deciding if apparent authority to consent exists, "is not whether the right to be free of searches has been waived, but whether the right to be free of *unreasonable* searches has been violated." *Id.* at 187.

Officer Nelson's conclusion that W.M. possessed apparent authority is proper because the facts made available to him would warrant a reasonable officer that W.M. possessed joint control over the apartment and cell phone. Therefore, this Court should reverse the Circuit Court's finding that Officer Nelson's conclusion was unreasonable.

A. *Officer Nelson's belief that W.M. held joint access and control over the apartment was reasonable because he was aware that W.M. lived with Respondent and had unchecked access to the apartment.*

Officer Nelson reasonably believed that W.M. held the authority to consent to a search of the apartment because the facts made available to him indicated that W.M. had joint control of the premises. The present case is analogous to *United States v. Groves* in that W.M. had "unchecked access to the apartment" like the girlfriend in *Groves*, who maintained "unlimited access to the premises." R. at 12; 530 F.3d 506, 510 (7th Cir. 2008). Similar to the girlfriend in *Groves*, W.M. performed chores and received personal mail at the residence. R. at 12, 30-31; *Id.* at 510. W.M. also knew where the spare key to gain access to the apartment was. R. at 31. The balancing of these factors proves to be instructive in finding a basis for apparent authority. *Id.* at 509-10.

Overall, Respondent gave W.M "unlimited" access to his residence that led Officer Nelson to reasonably believe that she had joint access or control over the premises, as the court in *Groves* did. *Id.* at 510. This reasoning is in line with what the *Groves* court considered the underlying rationale of apparent authority, "that by allowing someone else to exercise actual or apparent authority over one's property, one is considered to have assumed the risk that the third party might permit access to others, including government agents." *Id.* at 509. Furthermore, Respondent assumed the risk that law enforcement officers would search the apartment at 621 Sasha Lane by doing the following: cohabitating with W.M. for more than a year; sharing the entire apartment with W.M.; allowing W.M. to receive highly sensitive and personal mail at the apartment; and most noteworthy, giving W.M. "unchecked access" to the apartment. R. at 4, 12, 29, 30. Therefore, because all of this was made available to Officer Nelson, it was reasonable for him to conclude that W.M. held joint access or control over 621 Sasha Lane.

W.M.'s status as a victim of sex trafficking does not diminish Officer Nelson's reasonable belief that she held apparent authority to consent to a search of the apartment; rather, Officer Nelson sought her consent to search the apartment in order to pursue his investigatory responsibilities as noted by this Court in *Fernandez v. California*. 134 S.Ct. 1126, 1132 (2014). Officer Nelson's act of seeking W.M.'s consent to search the apartment after learning that she might be a victim of child sex trafficking is what this Court in *Fernandez* considered "part of the standard investigatory techniques of law enforcement agencies." *Id.* After Officer Nelson determined that W.M. was the victim, he asked her questions about her relationship with Respondent. R. at 29. Upon learning that she lived with Respondent and that they "shared everything," Officer Nelson requested her consent to search the premises. R. at 29-31. Seeking W.M.'s consent to search the apartment was necessary to determine the validity of W.M.'s status as a victim of sex trafficking. *Id.* at 1132. Therefore, her status as a victim does not diminish Officer Nelson's reasonable belief that she held the apparent authority to consent to a search of the premises.

Respondent's action of keeping a spare key under a fake rock and not giving W.M. her own are not necessary conditions that negate a finding of apparent authority. *See United States v. McGee*, 564 F.3d 136, 141 (2d Cir. 2009) (finding that defendant's act of locking his girlfriend out from the residence and keeping her bags inside confirmed that she did have access into the residence because defendant was preventing her from leaving). Even if this Court is willing to find that W.M. was subject to the will of Respondent because she was a victim of sex trafficking and had limited access to the apartment, her ability to consent is unaffected. Possession of a key may provide an important clue of whether a third person can consent to entry by the police, but "it does not necessarily answer the question." *Id.* Here, the fact that W.M. did not have a key of

her own is only a minor factor to consider. *Id.* As noted above, W.M. was given "unchecked access to the apartment." R. at 12. Therefore, Officer Nelson was justified in finding that she had the apparent authority to consent.

Furthermore, W.M.'s age of minority does not negate Officer Nelson's reasonable belief that she had apparent authority to consent. W.M.'s minority does not relinquish a finding of reasonableness; rather, it is incorporated into the overall analysis under the totality of the circumstances. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998) (holding that a fourteen-year-old traveling with defendant had the authority to consent to a search of a motel room because this informed the officer's reasonable belief that she had mutual use of the motel room). Similarly, Officer Nelson knew that W.M. was sixteen years old when he saw her driver's license. R. at 4. W.M.'s age coupled with all of the facts known to Officer Nelson, as discussed above, support a finding that W.M. had apparent authority to consent, just as the court held in *Gutierrez-Hermosillo*. R. at 12. Therefore, W.M.'s age of minority does not negate a finding of reasonableness.

Officer Nelson was not obligated to inquire further to establish a basis for apparent authority to consent to the search of the apartment because the circumstances did not create a basis for ambiguity. An officer is not required to ask questions unless the circumstances are ambiguous. *United States v. Andrus*, 483 F.3d 711, 720-21 (10th Cir. 2007); *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992) (defining ambiguity as a situation where agents do not learn enough about the circumstances to make it clear whether there is mutual use by the person giving consent) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990) and *United States v. McAlpine*, 919 F.2d 1461, 1463 (10th Cir. 1990)); *United States v. Kimoana*, 383 F.3d 1215, 1222-23 (10th Cir. 2004) (refusing to find ambiguity concerning mutual use of a motel

room when defendant was not a registered guest of the room). Any factual knowledge acquired after consent that undermines the reasonable conclusion for a basis of third-party apparent authority is immaterial. *Andrus*, 483 F.3d at 722 (citing *United States v. Morgan*, 435 F.3d 660, 664 (6th Cir. 2006)) (internal citations omitted). As noted above, it was reasonable to conclude that W.M. held joint access or control over the apartment. Furthermore, W.M. did not express any confusion to indicate that her joint access or control over the apartment was ambiguous enough to warrant a reasonable officer to conclude otherwise. R. at 4, 31.

Even if this Court is willing to find that Officer Nelson had to inquire further because an ambiguity concerning her common authority existed, any concern should be quelled. In fact, Officer Nelson went above and beyond what the court in *Andrus* found to be a point where inquiry may be required. *Id.* at 720-21. He asked W.M. for clarification concerning her common authority over the residence after being told that both parties lived together. R. at 29. After becoming aware that W.M. and Respondent cohabitated, Officer Nelson went the extra mile and asked her what belongings she kept at 621 Sasha Lane, and she informed him that she also received personal and sensitive mail there. R. at 30-31. Therefore, even if ambiguity existed during the initial encounter with W.M., Officer Nelson eliminated any such ambiguity by clarifying the situation surrounding W.M.'s stay at the apartment.

Officer Nelson's search of 621 Sasha Lane did not exceed the scope of the consent given by W.M. because a reasonable officer would have understood the exchange to include the search underneath the bed. Whether a search remained within the boundaries of consent and is reasonable is a question of fact that is to be determined from the totality of all the circumstances. *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986). Furthermore, vagueness of a request or confusion by the consenter provides an indication that the scope of the consent to

search may have been exceeded. *Id.* at 892-93. The *Espinosa* court found that the scope of the search was not exceeded: the defendant did not express any concern while his car was undergoing a systematic search, the search lasted fourteen minutes, and no attempt was made to clarify the consent given. *Id.* at 892. These circumstances and the failure of the defendant to object to the search proved to be an indication that the scope of the search was not exceeded. *Id.* Similarly, W.M. did not at any time exhibit confusion as to Officer Nelson's request to search the apartment. R. at 4, 31. W.M. did not object during the search of the premises. R. at 4, 31. These circumstances and the response by W.M. indicate that a reasonable person would have understood the consent to search 621 Sasha Lane to include looking under the bed. Therefore, the scope of the consent to search was not exceeded.

B. *Officer Nelson's belief that W.M. held joint access and control over the cell phone was reasonable because Officer Nelson was aware that W.M. and Respondent shared the cell phone, and W.M. used the cell phone for personal matters as any user with exclusive control would.*

Officer Nelson reasonably believed W.M. held apparent authority to consent the search of the cell phone because the facts made known to him indicated that W.M. held joint access or control over the cell phone. A cell phone for purposes of apparent authority to consent should be treated as a computer. *Riley v. California*, 134 S.Ct. 2473, 2489 (2014) (discussing that "[t]he term cell phone is itself misleading" because "many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone") (internal quotation marks omitted). Apparent authority to consent to a search of a cell phone is judged by an objective standard and is valid only where officers reasonably could conclude from the facts available that the third party had authority to consent to the search. *Morgan*, 435 F.3d at 663 (finding that wife had apparent authority to consent to the search of husband's computer because it was in a common area, she had installed spyware on it, and she indicated to the officers that she had

access to it). W.M. told Officer Nelson that she shared the cell phone with Respondent. R. at 4. She gave permission to search the cell phone. R. at 4. W.M. knew the password for the cell phone and used it to operate her social media accounts, send personal texts, and make personal calls. R. at 4, 13, 32. Overall, the nature of W.M.'s relationship with Respondent coupled with the possessory characteristics she maintained over the cell phone suggested to Officer Nelson that she had apparent authority to consent to the search.

Apparent authority is not present when a third party has affirmatively disclaimed access to or control over an electronic device; this was not the situation here because W.M. shared mutual access to the cell phone and knew the password for it. *Andrus*, 483 F.3d at 720-22 (holding that father of defendant had apparent authority to consent to a search of defendant's computer, even though he did not use it and it was password protected, because the father "did not say or do anything to indicate his lack of ownership or control"). W.M., unlike the father in *Andrus*, knew the password for the cell phone. R. at 4. Further, at no point during Officer Nelson's discussion with W.M. did she express or demonstrate that she lacked access to the cell phone. R. 13, 32. Therefore, based on the facts made available to Officer Nelson concerning the cell phone, it was reasonable to conclude that W.M. held joint access and control over the cell phone.

Any expectation of privacy in the cell phone that Respondent held does not discredit Officer Nelson's reasonable belief that W.M. held joint access or control over it because Respondent voluntarily relinquished some of his expectation of privacy by sharing it. An individual assumes the risk that others will search his or her property when he or she voluntarily shares access or control over his property with a third-person. *Gutierrez-Hermosillo*, 142 F.3d at 1231; *See also Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that allowing a third-person

to use a bag and then leaving it at the third-person's residence creates an assumption of the risk that the third-person will allow another to search it). In the context of digital devices or instruments, apparent authority to consent is not found when the only permission given over the device is to destroy it. *See, e.g.*, *United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003) (finding a priest had no apparent authority to consent to a search of defendant's CD's containing child pornography when the only permission given to him was to destroy them).

W.M. used the cell phone as any other exclusive user would: she knew the password to the phone, used it for personal communication, and operated her social media accounts through it. R. at 4, 13, 32. Furthermore, Officer Nelson found the cell phone on the nightstand next to the bed that both W.M. and Respondent shared. R. at 31. The permission granted to W.M. does not at all equate to the level of unpermitted access granted in *James. Id.* at 615. Therefore, by granting access to the mutual use of the cell phone to W.M., Respondent assumed the risk that others may search the cell phone with her consent.

Officer Nelson was not obligated to inquire further to establish a basis for apparent authority to consent to the search of the cell-phone because the circumstances did not create a basis for ambiguity as discussed in *Andrus*. 483 F.3d at 720-21. Further, any factual knowledge acquired by Officer Nelson after consent was granted that undermines the reasonable conclusion for a basis of third-party apparent authority is immaterial. *Id.* at 722. As noted above, it was reasonable to conclude that W.M. held joint access and control over the cell-phone, and therefore, Officer Nelson was not obligated to inquire further because no ambiguity existed that would warrant such action.

Officer Nelson's search of the cell phone did not exceed the scope of the consent granted by W.M. because she did not express any objection or confusion – an indicator that the scope of

the search has been exceeded as noted in *Espinosa*. 782 F.2d at 892. Whether a search remains within the boundaries of consent is a question of fact to be determined from the totality of the circumstances. *Id.* at 892-93. After Officer Nelson asked W.M. if the phone belonged to her, W.M. stated that it was the phone she "shared" with Respondent. R. at 31. Through the course of ascertaining the ownership of the cell phone, Officer Nelson arrived to the conclusion that the phone was mutually shared by both parties. R. at 31-32. When Officer Nelson asked W.M. if he could search the phone, she said yes. R. at 32. A search of the cell phone revealed inappropriate images of W.M. and a video of Respondent rapping about pimping. R. at 32. While the search was in progress, W.M. did not express any confusion as to the request by Officer Nelson, and she did not object to his search or the boundaries in which he promulgated the search. R. at 31-32. Therefore, Officer Nelson did not exceed the scope of the search of the cell phone.

CONCLUSION

A search pursuant to L.O. 1923 is constitutional because it satisfies the special needs exception of the Fourth Amendment. The primary purpose of L.O. 1923 is to protect local and visiting children from the increased demand in child sex trafficking during the All-Star Game. This primary purpose goes beyond ordinary law enforcement because it addresses a specific concern and is not aimed at a collecting evidence of a specific crime, or of sex trafficking in general. Furthermore, the compelling governmental interest of staving off considerable harm, and minimally intrusive search outweigh any concerns on individual privacy thus making the warrant and probable cause requirements un necessary to render L.O. 1923 reasonable.

Moreover, Officer Nelson's search of the apartment and the cell phone did not exceed the scope of the consent granted by W.M. Officer Nelson was aware that W.M. and Respondent cohabitated together, and mutually shared access at the apartment. Furthermore, he was made

aware that W.M. and Respondent shared the cell phone. She told the officer that she used the cell phone for personal communication including the operation of her social media accounts. At no point during the search of the apartment and the cell phone did W.M. voice an objection or contend the searches.

This Court should reverse the Thirteenth Circuit's finding that searches conducted pursuant to L.O. 1923 violate the Fourth Amendment. It should also reverse the finding that Officer Nelson was not reasonable in concluding that W.M. held the apparent authority to consent to the search of the apartment or the cell phone, and the finding that Officer Nelson exceeded the scope of the search granted.